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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 IN RE HYDROXYCUT MARKETING
13 AND SALES PRACTICES LITIGATION

14 ERIN L. STAMMER,

15 Plaintiffs,

16 vs.

17 IOVATE HEALTH SCIENCES, U.S.A.,
18 INC., et al.,

19 Defendants.
20

CASE NO. 09md2087 BTM (KSC)

CASE NO. 11cv1598 BTM(KSC)

**ORDER DENYING MOTION TO SET
ASIDE DISMISSAL**

21
22 Plaintiff Erin L. Stammer has filed a motion under Fed. R. Civ. P. 60 to set aside the
23 judgment of dismissal. For the reasons discussed below, Plaintiff's motion is **DENIED**
24 **WITHOUT PREJUDICE.**

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26 **I. FACTS**

27 On April 4, 2012, Defendant Iovate Health Sciences U.S.A., Inc. ("Defendant") filed a
28 request for dismissal of Plaintiff's claims for failure to provide a timely Plaintiff Fact Sheet

1 (“PFS”) in accordance with the Court’s May 17, 2010 order and Case Management Order
2 (“CMO”) dated September 10, 2010.

3 The CMO outlines the procedure in the event of any deficiencies relating to a PFS.
4 According to the CMO, certain deficiencies, including failure to serve a PFS, shall be deemed
5 “Threshold Deficiencies.” After receipt of a Deficiency Notice that identifies a Threshold
6 Deficiency, a Plaintiff shall have 25 days to cure the deficiencies. If the Plaintiff fails to cure
7 any Threshold Deficiency identified in the Deficiency notice, Defendant may file the Deficiency
8 Notice and Request for Dismissal with the Court.

9 After the filing of a Request for Dismissal, the CMO provides that the Plaintiff has an
10 additional fifteen (15) days to serve a certification that Plaintiff has served a PFS curing the
11 Threshold Deficiency (and all the required authorizations identified in its instructions), and must
12 attach appropriate documentation demonstrating such service. Absent such certification,
13 Defendant’s Request for Dismissal shall be granted and the case dismissed without prejudice.

14 On August 22, 2011, October 6, 2011, and October 12, 2011, Defendant’s counsel
15 corresponded with Plaintiff’s counsel, informing Plaintiff’s counsel that Plaintiff had not
16 completed a Claimant Information Sheet (“CIS”), which was required to participate in mediation,
17 or a PFS. (Exs. A, B, and C to Herman Decl. in support of Request for Dismissal). On
18 December 12, 2011, Plaintiff provided a CIS but did not provide a PFS. (Herman Decl. ¶ 5.)

19 On March 1, 2012, Defendant mailed a Deficiency Notice to Plaintiff’s counsel identifying
20 Plaintiff’s failure to timely provide a PFS.

21 On April 9, 2012, the Court ordered Plaintiff to show cause why her claims against
22 Defendant should not be dismissed. The Court informed Plaintiff that if she did not, by April
23 19, 2012, file and serve a certification that she had completed and provided Defendant with a
24 PFS and all required authorizations, her claims were subject to dismissal without prejudice.
25 The Court also directed Plaintiff to respond to the OSC on or before April 25, 2012. Plaintiff
26 did not file a certification or a response to the OSC.

27 Accordingly, on April 27, 2012, the Court dismissed Plaintiff’s claims without prejudice.
28 That same day, the Clerk entered judgment dismissing Plaintiff’s claims without prejudice.

II. DISCUSSION

Plaintiff moves to set aside the judgment of dismissal on the ground of mistake or excusable neglect. Fed. R. Civ. P. 60(b)(1). As discussed below, the Court finds that such relief is not warranted.

The term “excusable neglect” extends to cases of negligence, carelessness, and inadvertent mistake. Bateman v. United States Postal Service, 231 F.3d 1220 (9th Cir. 2000). In determining whether negligence on the part of counsel constitutes “excusable neglect,” courts consider the following four factors set forth in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 395 (1993): (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. Bateman, 231 F.3d at 1223.

Plaintiff contends that she believed that she had complied with all relevant deadlines. She states that Defendant now has all of the requested documents and has therefore suffered no prejudice.


However, as of the filing of Defendant’s Opposition to Plaintiff’s motion, Plaintiff had not provided Defendant with a PFS. Plaintiff has not filed anything with the Court showing that a completed PFS has been provided to Defendant. In December 2011, Plaintiff provided Defendant with a CIS, but never provided Defendant with a PFS. It was clear from the correspondence between Defendant’s counsel and Plaintiff’s counsel that the PFS was a separate and additional requirement. In the Request for Dismissal [Doc. No. 22], Defendant’s counsel reiterated that although they had received a CIS from Plaintiff, they had not received a completed PFS.

Plaintiff did not respond to the OSC. If Plaintiff somehow believed that she was in compliance with the OSC and all relevant deadlines, she should have filed a response to that effect. Instead, Plaintiff remained silent, and the case was dismissed. Plaintiff does not explain why she failed to respond to the OSC.

1 However, the Court is reluctant to deprive Plaintiff of the opportunity to pursue her claims
2 based on her counsel's conduct. Therefore, the Court will consider setting aside the dismissal
3 if, within 30 days: (1) Plaintiff's counsel pays to Defendant's counsel the sum of \$1,000,
4 representing reasonable attorney's fees for bringing the motion to dismiss and opposing the
5 motion to set aside (4 hours at \$250 per hour); (2) Plaintiff serves a complete PFS on
6 Defendant; (3) Plaintiff files a certification with the Court that Plaintiff has served Defendant
7 with the PFS and that Plaintiff's counsel has paid the \$1,000 to Defendant's counsel; and (4)
8 Plaintiff files a new motion to set aside the dismissal based on Plaintiff's compliance with the
9 Court's requirements.

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11 **IT IS SO ORDERED.**

12 DATED: July 23, 2012

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14 BARRY TED MOSKOWITZ, Chief Judge
15 United States District Court
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